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Hearing

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SOUNDVIEW ELITE LTD. and
4 VANQUISH FUND LTD.,

Plaintiffs,

5 v.

13 CV 6895 (AT)

6 GERTI MUHO and LEVERAGED HAWK,
7 INC.,

8 Defendants.

9 -----x

10 October 22, 2013
11 3:10 p.m.

12 Before:

13 HON. ANALISA TORRES,

14 District Judge

15 APPEARANCES

16 PATTERSON, BELKNAP, WEBB & TYLER LLP

Attorneys for Plaintiffs

17 BY: NICHOLAS COMMANDEUR

ETHAN M. KRASNOO

18 ALSO PRESENT: Floyd Saunders

Elizabeth Riordan

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1 3:10 p.m.

2 (Case called)

3 MR. COMMANDEUR: Good afternoon, your Honor, Nicholas
4 Commandeur from Patterson, Belknap, Webb & Tyler for the
5 plaintiffs. I have with me Mr. Floyd Saunders who is a client
6 representative, secretary of the relevant funds, and my
7 colleagues Ethan Krasnoo and Elizabeth Riordan.

8 THE COURT: So tell me what has happened since our
9 last meeting.

10 MR. COMMANDEUR: Well, since we last were together
11 last week, your Honor, we have complied with your Honor's
12 order. We posted the bond. We also effectuated service. Your
13 Honor had in the last Wednesday's order indicated that service
14 needed to be complete by yesterday. In fact, we served the
15 entity defendant Leveraged Hawk on Thursday the next day, and
16 then we served Mr. Muho who is the individual defendant on
17 Friday, we served him at the same address where we had
18 previously served the complaint.

19 In addition to that, your Honor, we filed the
20 affidavits of service with the Court.

21 In addition to that, yesterday, since we hadn't heard
22 anything from him, we sent all of the papers by e-mail to the
23 e-mail address that we had for Mr. Muho. We also attempted to
24 deliver the papers to another address that we had in Manhattan
25 associated with him, and there was no one home. We confirmed

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1 that it is a residence that he apparently maintains, it's in
2 downtown Manhattan, but there was no one there.

3 So we have not heard anything from him yet. We have
4 completed service.

5 Today is also the day by which I believe, if I'm
6 calculating the time correctly, his answer to the original
7 complaint is due. So we may be in a situation where, you know,
8 come tomorrow he's in default in the case.

9 So from our perspective, your Honor, the relief that
10 we are seeking is certainly a continuation of the restraining
11 order that your Honor issued last week so that he can't further
12 dissipate these funds that are at issue. And we would also
13 request, as we had identified in our Order to Show Cause, an
14 attachment order so that we can actually go out -- we have
15 identified certain accounts where these funds were transferred
16 to as we explained to your Honor last Wednesday. It seems as
17 though the majority of the funds have already been transferred.
18 It may be that all of the funds have been transferred at this
19 point. But we would like to have the ability to issue that
20 order of attachment.

21 In addition, your Honor, we would like to conduct some
22 expedited discovery. It's unclear if the defendants will be
23 participating in this action, so whether we're going to be able
24 to get discovery from them is unclear. I would imagine,
25 though, we may want to pursue some additional discovery from

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1 different banks. As your Honor may recall when we here on
2 Wednesday we had some information from the Citibank account
3 where the funds were transferred to, but we understand that
4 Mr. Muho may maintain some other accounts and we would like to
5 try to obtain discovery of those accounts as well to see if we
6 can track where those funds have gone.

7 And of course, you know, I'm happy to make a more
8 fulsome presentation about, you know, what would be the merits
9 not only of our substantive claim, but also the other issue
10 obviously that I know the Court considers when considering
11 attachment and preliminary injunction, you know, the real risk
12 in this case that the funds are going to be dissipated and that
13 the defendant will be unable to satisfy any judgment that we
14 ultimately obtain. Those arguments were spelled out in our
15 papers and I know the Court has considered, but I'm happy to
16 address those if that would be useful.

17 THE COURT: Exactly how was he served?

18 MR. COMMANDEUR: He was served -- when we were serving
19 the complaint we tried several addresses. We had one address
20 for him in California. We went to that address, and the couple
21 who answered the door said they never heard of him.

22 We then tried to serve him at the address that we had
23 in Lower Manhattan, and it was an address where he maintains an
24 apartment. The doorman at that building confirmed that he
25 lives there, but he hadn't seen him in weeks.

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1 We then found an address in Ridgewood, I believe, in
2 Queens which is where which we effectuated service. It was
3 accepted by I believe his mother. The papers were accepted,
4 the complaint at that address. And then -- which is
5 appropriate under New York rules of service of process which
6 applies here. And then so when we were serving the papers --
7 and obviously we served the papers on, the complaint on
8 Leveraged Hawk, the corporate entity through their designated
9 agent of service. And so we did the same when we were serving
10 your Honor's order on the restraining order last week, we
11 served the same address in Ridgewood where we had previously
12 served the complaint. We also served the same agent of process
13 for Leveraged Hawk and filed those affidavits of service. And
14 then, as I said, in an abundance of caution we sent courtesy
15 copies to the other outlets of communication that we had for
16 him. We did that yesterday, and we still haven't heard
17 anything.

18 THE COURT: You may be seated.

19 MR. COMMANDEUR: Okay.

20 THE COURT: So at this point you are seeking three
21 things; the preliminary injunction, the attachment order, and
22 an order permitting early discovery, correct?

23 MR. COMMANDEUR: That's correct, your Honor.

24 THE COURT: Okay. All right so I am just going to
25 read my decision into the record having reviewed all of the

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1 papers submitted by plaintiffs.

2 Plaintiffs, Soundview Limited and Vanquish Fund
3 Limited move pursuant to Rule 64 of the Federal Rules of Civil
4 Procedure and CPLR article 62 for a preliminary injunction
5 extending my October 16th, 2013 order which froze the assets of
6 defendants Gerti Muho and Leveraged Hawk, Inc and order of
7 attachment.

8 Plaintiffs also seek expedited discovery including an
9 order that defendant Muho shall appear for a deposition.

10 What date are you looking for?

11 MR. COMMANDEUR: Your Honor, we had proposed I think
12 in an order to show cause it happen sometime in November under
13 the assumption that we would like to get out some document
14 requests, limited in nature, and have those before we take the
15 deposition. Obviously, the challenge we have here is that if
16 we don't have a cooperative counter party -- I mean, we
17 obviously can serve our discovery demands, but I don't have
18 much faith that we'll hear anything from him or, you know, be
19 able to work out a schedule. I suppose if your Honor can set a
20 date for him to appear for a deposition, that may be helpful.
21 Then at least we have, you know, the power of the Court's
22 order, and perhaps sometime in mid November for that. But,
23 again, I don't hold out much hope that we're going to hear from
24 him.

25 THE COURT: How is November 18th?

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1 MR. COMMANDEUR: I think that would be fine, your
2 Honor.

3 THE COURT: As I was stating, the plaintiffs also seek
4 expedited discovery, including an order that defendant shall
5 appear for deposition, and that plaintiff may serve
6 interrogatories and document requests upon defendants, which
7 shall be answered and produced, respectively, no later than ten
8 days prior to the deposition. For the reasons stated below,
9 both applications are granted.

10 Federal Rule of Civil Procedure 64 makes available to
11 the Court all the remedies under the law of this state where
12 the court is located providing for seizing a person or property
13 to secure satisfaction of the potential judgment. Federal Rule
14 of Civil Procedure 64(a). These remedies include attachment.
15 Federal Rule of Civil Procedure 64(b).

16 Under CPLR Section 6212(a), to obtain an order of
17 attachment plaintiffs must show the following: One, there is a
18 cause of action; two, it is probable that plaintiffs will
19 succeed on the merits; three, one or more grounds for
20 attachment detailed in CPLR Section 6201 is present; and, four,
21 the amount demanded from the defendants exceeds all
22 counterclaims known to the plaintiffs.

23 Plaintiffs have established causes of
24 action for conversion and unjust enrichment.

25 Conversion exists where a defendant has wrongfully

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1 assumed and exercised a right of ownership over goods belonging
2 to another to the exclusion of the owner's rights. Vigilant
3 Insurance Company of America versus Housing Authority of the
4 City of El Paso, Texas, 660 Northeast 2d 1121, 1136, New York
5 1995. Based upon the evidence submitted by plaintiffs,
6 defendant Muho affected a wire transfer of \$2,067,337.24 from
7 plaintiffs' HSBC account to defendant Leveraged Hawk's Citibank
8 account without any right or authorization. Muho and/or
9 Leveraged Hawk currently possess the funds to the exclusion of
10 plaintiffs' right. Accordingly, plaintiffs have established a
11 prime facie case of conversion.

12 Unjust enrichment exists where defendants were
13 enriched at the expense of the plaintiffs, and the
14 circumstances are such that in equity and in good conscience
15 the defendant should return the money or property to the
16 plaintiff. Dolmetta versus Unintah National Corporation, 712
17 F.2d, 15, 20, Second Circuit, 1983. Based upon the evidence
18 submitted, plaintiffs have established unjust enrichment.
19 Defendants were enriched by the wire transfer of over \$2
20 million to Leveraged Hawk's Citibank account, which was at the
21 expense of Soundview and Vanquish, as the funds were drawn on
22 their account, so Soundview and Vanquish were wrongfully
23 deprived of the funds.

24 Plaintiffs have demonstrated a likelihood of success
25 on the merits. Plaintiffs have presented evidence in support

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1 of each cause of action in the form of the Metcalf and Saunders
2 affidavits and documents, including a Debit Advice
3 memorializing the unauthorized transfer to Leveraged Hawk's
4 Citibank account and the records showing that Muho's employment
5 relationship with plaintiff was terminated by May 10th, 2013,
6 such that he had no authority to exercise control over
7 plaintiffs' accounts.

8 Under CPLR 6201, attachment may be granted where the
9 plaintiff has demanded, and would be entitled, in whole or in
10 part, or in the alternative, to a money judgment against one or
11 more of the defendants if the defendant with intent to defraud
12 his creditors or frustrate the enforcement of a judgment that
13 might be rendered in the plaintiffs' favor, has assigned,
14 disposed of, encumbered or secreted property, or removed it
15 from the state or is about to do any of those acts. CPLR 6201
16 and 3. See also American Federal Group versus Rothenberg, 1998
17 U.S. District Lexis 7832 at 19, Southern District of New York
18 May 27th, 1998, stating that "courts generally require a
19 showing that something, whether it is a defendant's financial
20 position or past and present conduct poses a real risk to the
21 enforceability of a future judgment." Courts typically infer
22 defendants' intent to frustrate enforcement of a judgment from
23 the circumstances. See JSC Foreign versus Trade Services, 306
24 F. Supp. 2d, 482, Southern District of New York 2004.

25 Plaintiffs have established that an attachment is

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1 necessary under CPLR 6201(3) to preserve the funds because
2 defendants are likely to spend or remove the money before
3 plaintiffs could obtain a judgment in this action. Shortly
4 after staying to a Delaware Superior Court Judge that neither
5 he nor Leveraged Hawk had any money to hire counsel in the
6 Delaware action, Muho hired counsel to represent him in a
7 litigation within days after obtaining plaintiffs' funds from
8 HSBC. This indicates that Muho may have already spent or is
9 maybe in the process of spending the converted funds.
10 Additionally, plaintiffs have submitted evidence of
11 questionable behavior involving Muho, including Muho's initial
12 unsuccessful attempts to convert money from the Richcourt
13 Funds' accounts on May 7th, 2013, and gambling in Atlantic City
14 on August 20th, 2013, that suggests he may not retain the funds
15 at issue pending outcome of the present litigation. A
16 substantial danger exists that defendants may remove or
17 continue to remove plaintiffs' property from their Citibank
18 account or elsewhere in the Southern District of New York,
19 whether by spending the funds, transferring or hiding them.
20 Indeed, the Court has learned from plaintiffs' attorneys that
21 as of October 16th, 2013 less than \$500,000 remains in the
22 Citibank account of the original 2,067,377.24.

23 Plaintiffs seek money damages through the return of
24 the monies converted from their HSBC accounts, and as
25 plaintiffs state that they do not know any counterclaims that

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1 are available or alleged by defendants, this amount exceeds all
2 known counterclaims.

3 The standard for an entry of a temporary restraining
4 order is the same as for a preliminary injunction.

5 First, the likelihood of success on the merits;
6 second, irreparable harm in the absence of an injunction. I've
7 already addressed requirements one and two.

8 The third requirement is a balance of he hardships
9 tipping in the movant's favor. Here the balance of hardships
10 tips in plaintiffs' favor. Given Muho's recent application for
11 unemployment benefits, it appears unlikely that he will be able
12 to satisfy a judgment against him without plaintiffs' funds.
13 See Elliott versus Kieseewetter, 98 F.3d, 45, 54, Third Circuit,
14 1996. "A district court is clearly permitted to consider the
15 likelihood that a defendant will be able to pay a judgment in
16 determining whether to enter an asset freeze order."

17 Finally, the requested preliminary restraint would not
18 undermine the interests of the public. Rather, the requested
19 order seeks merely to preserve the status quo and ensure that
20 the funds at issue are not dispersed or hidden during this
21 action. See In Re: Baldwin-United 770 F.2d 328, 338 Second
22 Circuit, 1985. "Preliminary injunctions under Rule 65 are
23 designed to preserve status quo between the parties before the
24 court pending a decision on the merits of the case at hand."

25 Finally, this Court will allow plaintiffs to obtain

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1 expedited discovery. This Court possess significant discretion
2 as to the timing of discovery under Rule 26(d) of the Federal
3 Rules of Civil Procedure. In particular Rule 26(d)(1)
4 expressly provides for discovery before the Rule 26(f)
5 conference when authorized by court order. In determining
6 whether plaintiffs are entitled to expedited discovery, courts
7 in this district apply a standard of reasonableness and good
8 cause. *Ayyash Bank v. Al-Madina*, 233 F.R.D. 325, 326, Southern
9 District of New York 2005. In *Ayyash*, the Court granted an ex
10 parte application for expedited discovery under the flexible
11 standard of reasonableness and good cause where plaintiff has
12 made a strong evidentiary showing of the substantiality of his
13 claims and in consideration that defendants had both incentive
14 and capacity to hide their assets. *Id.*

15 In the present action, good cause exists to allow
16 plaintiffs to commence limited discovery immediately in order
17 to identify documents and assets that defendants obtained from
18 plaintiffs and may be attempting to hide, as well as the
19 location of such assets.

20 So I am going to set down the deposition date as
21 November 18th, and I am willing to sign an order of attachment.
22 Do you have that ready?

23 MR. COMMANDEUR: I don't have one with me, but if it's
24 all right with your Honor, we can submit, if not later today,
25 certainly tomorrow.

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1 THE COURT: That's fine.

2 MR. COMMANDEUR: Okay. Thank you.

3 THE COURT: Is there anything else?

4 MR. COMMANDEUR: I think that's all for -- we may also
5 issue some subpoenas to some of the financial institutions that
6 we suspect he may also hold accounts at, but I don't envision
7 that requiring any oversight from the Court.

8 THE COURT: Okay, thank you.

9 MR. COMMANDEUR: Thank you, your Honor.

10 (Adjourned)

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